

## **REMARKS**

The Final Office Action of November 30, 2009, has been received and reviewed. All claims currently under consideration except for claims 31 and 33 stand objected to and/or rejected. Claims 31 and 33 stand objected to as being dependent on a rejected base claim. Claim 22 was rejected under 35 U.S.C. §112, 2<sup>nd</sup> paragraph. This application is to be amended as previously set forth. All amendments and claim cancellations are made without prejudice or disclaimer. Reconsideration is respectfully requested.

In order to expedite prosecution, the elements of all rejected base claims have been incorporated into objected to claims 31 and 33. Dependent claims have been amended, where necessary, such that all now depend from one or more allowable base claims.

Claims 11, 18, 19, and 72 were previously withdrawn, but rejoinder of these claims is respectfully requested. Claims 11, 18, 19, and 72 are presented herein in amended format, so as to recite all elements of an allowable independent product claim.

### **Entry of Amendments**

Pursuant to 37 C.F.R. § 1.116, applicant respectfully submits that the amendments presented herein should be entered, as the amendments are made to expedite prosecution and remove issues for appeal and place the application in condition for allowance.

Applicant respectfully notes that, as indicated at MPEP § 714.13(III), the Office is required to give the proposed amendment sufficient consideration to determine whether the claims are in condition for allowance and/or whether the issues on appeal are simplified. Applicant respectfully submits that the amendments avoid the rejections set forth in the Final Office Action, raise no issues of new matter, present no issues requiring further consideration or search, and do not present any additional claims. If the Office determines that the amendments do not place the application in condition for allowance, entry is respectfully requested, as they remove issues for appeal. As such, applicant most respectfully requests that the amendments presented herein be entered, and a Notice of Allowance issued.

**Claim Objections:**

Claims 10, 21, 32, 34, and 67 were objected to for various formalities. (Final Office action, pp. 2-3.) Claims 21, 32, and 67 were canceled thus mooting the objections as to them. Claims 10 and 34 have been amended as suggested by the Office.

**35 U.S.C. § 112**

Claims 22 and 68 stand rejected under 35 U.S.C. § 112, second paragraph, for assertedly being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 68 was further rejected under 35 U.S.C. § 112, first paragraph, for assertedly lacking enablement. Claim 68 is to be canceled thus mooting the rejections under 35 U.S.C. § 112 as to that claim.

With respect to claim 22, the Office asserts,

Claim 22 is confusing in the recitation of ‘wherein said parent strain comprises SEQ ID NO:3 and SEQ ID NO:5 as taken literally this would require the parent strain to comprise two different thymidylate synthase genes as the same thymidylate synthase gene cannot comprise both sequences simultaneously. It is presumed applicants actually intended ‘SEQ ID NO:3 or SEQ ID NO:5’.

Final Office Action, at page 3.

Claim 22 has been amended to recite, “wherein said parent strain comprises SEQ ID NO: 3 or SEQ ID NO: 5,” as suggested by the Office. Consequently, applicant respectfully requests the rejection of claim 22 under 35 U.S.C. § 112, second paragraph, be withdrawn.

**35 U.S.C. 103(a)**

Claims 1, 3, 5-7, 10, 12-15, 17, 21, 23-26, 29, 30, 32, 34, 35, 37-39, 42, 65-67, and 69-71 stand rejected under 35 U.S.C. §103(a) as assertedly being unpatentable over Nilsson *et al.* (WO 00/01799), in view of Steidler *et al.* (WO 00/23471) and Curtiss III (U.S. Patent 4,888,170). Applicant has canceled claims 1, 21, 23-26, 29, 30, 32, and 66-71, rendering the rejection of these claims moot. Applicant has amended claims 31 and 33, and partially in view thereof request that the rejection be withdrawn.

The Office indicated that claims 31 and 33 would be allowable if rewritten in independent

form including all the elements of the base claim and any intervening claims. Accordingly, claim 31 has been amended to include the elements of claim 1, and claim 33 has been amended to include the elements of claim 32.

Claims 31 and 33 formerly recited compositions comprising “SEQ ID NO:3 or SEQ ID NO:5.” Claim 1 recited, *inter alia*, the element, “wherein said parent strain of *Lactococcus* species comprises a thymidylate synthase gene comprising at least 100 contiguous nucleotides that are at least 90% identical to SEQ ID NO:1; and at least 100 contiguous nucleotides that are at least 90% identical to SEQ ID NO:2.” SEQ ID NO:3 is a nucleotide sequence that comprises both SEQ ID NOs:1 and 2. SEQ ID NO:5 is a nucleotide sequence that comprises SEQ ID NO:2, and also comprises SEQ ID NO:1, with a single extra nucleotide at position 959 of SEQ ID NO:1 (corresponds to position 4427 of SEQ ID NO:5). Therefore, a composition comprising either SEQ ID NO:3 or SEQ ID NO:5, as recited in amended claims 31 and 33, would necessarily comprise at least 100 contiguous nucleotides that are at least 90% identical to SEQ ID NO:1, and at least 100 contiguous nucleotides that are at least 90% identical to SEQ ID NO:2. Claims 31 and 33 should thus be allowable for at least the reason that they claim subject matter indicated by the Office to be allowable.

As amended, claims 3, 5-7, 10, 12-15, 17, 34, 35, 37-39, 42, and 65 depend from nonobvious independent claim 22. The nonobviousness of independent claim 22 precludes a rejection of claims 3, 5-7, 10, 12-15, 17, 34, 35, 37-39, 42, and 65, which depends therefrom, because, *inter alia*, a dependent claim is obvious only if the independent claim from which it depends is obvious. MPEP § 2143.03.

### **Rejoinder**

Applicant respectfully requests rejoinder of claims 11, 18, 19, and 72. If an applicant elects claims directed to a product, and a product claim is subsequently found allowable, withdrawn process claims which depend from, or otherwise include all elements of, the allowable product claims will be rejoined. MPEP § 821.04; *In re Ochiai*, 71 F.3d 1565 (Fed. Cir. 1995); *In re Brouwer*, 77 F.3d 422 (Fed. Cir. 1996). Claims directed to a product (*e.g.*, claims 22, 31, and 33) were previously elected by the applicant. Amendment of March 27, 2004.

Product claims 22, 31, and 33 are in condition for allowance as they claim subject matter admitted to be allowable in the preceding Office Action. As such, applicant most respectfully requests rejoinder of process claims 11, 18, 19, and 72, which have been amended to include all elements of an allowable product claim.

In view of the foregoing remarks, the application should be in condition for allowance. If questions remain after consideration of the foregoing, the Office is kindly requested to contact applicant's attorney at the telephone number given herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Allen C. Turner', with a stylized, sweeping flourish extending to the right.

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